Siemens Energy & Automation, Inc. *and* International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local Union No. 1956, AFL–CIO. Case 15–CA–12149

August 10, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On July 6, 1998, Administrative Law Judge William N. Cates issued the attached bench decision. The General Counsel filed exceptions and a supporting brief, in which the Charging Party joined, and the Respondent filed cross-exceptions with a supporting brief and an answering brief to the General Counsel's exceptions. On February 9, 1999, following a remand by the Board,[1] the judge issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief, in which the Charging Party joined, and the Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and the briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We agree with the judge, for the reasons set forth below, that the Respondent did not unlawfully refuse to reinstate Jesse Banks after the instant strike, and that it lawfully suspended and subsequently discharged him for engaging in serious strike misconduct: i.e., throwing roofing tacks (also referred to as roofing nails) on the roadway at a vehicular entrance to the plant during the strike, and kicking a car as it passed through the picket line.

In his attached July 6, 1998 initial decision, the judge found it unnecessary to determine whether Banks had in fact engaged in the above misconduct so as to justify the Respondent's denial of reinstatement and discharge of Banks. Rather, the judge found that the record established that Banks made underhanded tossing motions at a vehicle that was entering the Respondent's facility at a time during the strike when this roadway was littered with roofing tacks, and also that Banks made a kicking motion at a car as it was entering the Respondent's facility during the strike. The judge found that such conduct alone was sufficiently serious strike misconduct to justify the Respondent's actions toward Banks. Thus, he recommended dismissal of the complaint on the basis of those findings alone, without finding whether Banks in fact threw tacks or kicked the car.

On December 21, 1998, we remanded the instant proceeding to the judge for him to determine, based on the preponderance of the evidence, whether Banks in fact kicked cars or threw roofing tacks onto the roadway at the vehicular entrance to the Respondent's plant during the strike. In his February 9, 1999 supplemental decision, the judge found that Banks did in fact throw tacks and kick a car, and he reaffirmed his prior recommendation that the complaint be dismissed. We affirm the judge's findings that Banks did in fact engage in the above misconduct, and we adopt his recommended Order dismissing the complaint.

In adopting the judge's recommended dismissal of the complaint, however, we find that he inappropriately applied the framework for analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Cases like this, where the issue is whether an employer may lawfully refuse to reinstate (and thus discharge) a striker on the basis of alleged strike misconduct, require a two-part analysis. First, under the standard in *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), an employer may lawfully deny reinstatement to a striker whose strike misconduct under the circumstances may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Second, under the framework for analysis in *Rubin Bros.*, 99 NLRB 610 (1952), *General Telephone Co.,* 251 NLRB 737 (1984), and *Axelson, Inc.,* 285 NLRB 862 (1987), once the General Counsel has initially established that a striker was denied reinstatement for conduct related to the strike, the burden of going forward with the evidence shifts to the employer to establish that it had an honest belief that the striker in question engaged in the strike misconduct. If the employer establishes that, then the burden of going forward shifts back to the General Counsel to establish that the striker in question did not in fact engage in the alleged misconduct.

In applying these principles to this case, we note that throwing roofing tacks on the roadway at a vehicular entrance to the plant during the strike, or kicking a car entering or leaving the plant during the strike, may reasonably tend to coerce or intimidate employees in the exercise of their right to refrain from participating in a strike. See, e.g., *GSM, Inc.,* 284 NLRB 174 (1987) (kicking a car); *Certainteed Corp.,* 282 NLRB 1101, 1115–1118 (1987) (throwing and placing nails); *PRC Recording Co.*, 280 NLRB 615, 615–616, 652–661

[1] Chairman Truesdale did not participate in the remand order. Member Brame dissented from the remand order, as he would have adopted the judge's original decision recommending dismissal of the complaint.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

(1986), enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987) (throwing and dropping nails). Further, we agree with the judge, for the evidentiary reasons he sets forth in his attached decisions, that the Respondent established that it had an honest belief that Banks engaged in such misconduct. Finally, we agree with the judge that the preponderance of the evidence, as set forth and discussed in his decisions, establishes that striking employee Jesse Banks in fact kicked a car and threw roofing tacks onto the roadway at a vehicular entrance to the Respondent's plant during the strike involved in this case. Conversely, then, we find that the General Counsel has failed to establish that Banks did not engage in that conduct. Accordingly, under the standard in *Clear Pine Mouldings* and the framework for analysis in, e.g., *Axelson*, we affirm the judge's conclusion that the Respondent lawfully refused to reinstate Banks after the strike and lawfully discharged him for engaging in the above strike misconduct.[3]

ORDER

It is ordered that the complaint is dismissed.

MEMBER BRAME, concurring.

I agree with my colleagues that the Respondent lawfully discharged Banks for strike misconduct. I also agree with my colleagues that the proper framework for analyzing this case is that set forth in *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).[1] Under *Clear Pine*, an employer may lawfully deny reinstatement to a striker whose actions during the strike reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights. Consistent with the Supreme Court's decision in *NLRB v. Burnup & Sims,* 379 U.S. 21 (1964), an employer may defend its decision not to reinstate a striker by showing that it had an "honest belief" that the striker engaged in misconduct. *Medite of New Mexico, Inc. v. NLRB,* 72 F.3d 780, 790 (10th Cir. 1995). The burden then shifts to the General Counsel to prove that no misconduct occurred. Id.

However, applying this standard, I would dismiss the complaint for the reasons stated in the judge's original decision. Thus, in agreement with the judge, I would find that the underhanded throwing motions which Banks made on the picket line alone, under the circumstances of this case, reasonably tended to coerce employees in the exercise of their Section 7 right to choose to work during the strike. *Clear Pine Mouldings,* supra.[2] This conduct was undisputed and establishes that the Respondent's failure to reinstate Banks after the strike was not unlawful. Id.[3] In such circumstances, a remand was unnecessary.[4] Of course, the judge's supplemental decision, and his conclusion that Banks did throw the tacks further demonstrates that the Respondent lawfully failed to reinstate him. I join my colleagues in adopting these findings.

Andrea J. Goetze, Esq., for the General Counsel.
*Armin J. Moelle*r *Jr., Esq*. and *Phelps Dunbar, Esq.,* for the Respondent.
*Danny E. Cupit, Esq.***,** for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge**.** This is a wrongful suspension and termination case. At the close of a 2-day trial in Jackson, Mississippi, on June 16, 1998, I rendered a bench decision in favor of Siemens Energy & Automation, Inc. (Company). This certification of that bench decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the National Labor Relations Board. I rendered the bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, I concluded counsel for the General Counsel (Government) made a prima facie showing sufficient to support an inference protected conduct was a "motivating factor" in the Company's decision to suspend, on November 6, 1992, and terminate, on November 18, 1992, its employee Jesse Banks. The Government demonstrated Banks, a long-term employee, had been active with the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local Union No. 1956, AFL–CIO (the Union); that the

[3] Under the circumstances of this case, we find that the General Counsel has misplaced reliance on *Clougherty Packing*, 292 NLRB 1139 (1989), and *Catalytic, Inc.,* 264 NLRB 1157 (1982), enfd. mem. 714 F.2d 158 (11th Cir. 1983), cert. granted in other part 104 S.Ct. 2164 (1984), see 275 NLRB 97 (1985). In both of those cases, contrary to this case, the employees *credibly* denied that they had engaged in the alleged strike misconduct (throwing rocks). The Board thus found in both of those cases that even assuming the employers had good-faith beliefs that the employees had engaged in the misconduct, the General Counsel had met its burden of establishing that they had not in fact engaged in that misconduct. Here, in contrast, the judge has *discredited* Banks' denial that he threw nails and kicked a car, and has found, based on the preponderance of the evidence as discussed in his decisions, that Banks in fact *did* engage in that misconduct.

[1] Thus, I agree with the majority that the judge erred in applying the framework for analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[2] As noted in the judge's original decision, individuals observing Banks' underhanded throwing motions would be intimidated and coerced by such actions. There were numerous instances in which tacks were found on the roadway in Banks' vicinity and the tacks damaged the tires of several employees who drove through the picket line.

[3] Accordingly, I find it unnecessary to address the other alleged incidents of strike misconduct by Banks, including whether or not he kicked at or kicked cars.

[4] Contrary to the phrasing of the majority's remand order, given that the Respondent had established that it had an honest belief that Banks threw tacks, the issue was not whether Banks in fact threw tacks, but whether the General Counsel proved that he did not. In this regard, in his original decision, the judge found that "the evidence is clearly inconclusive as to whether [Banks] had tacks in his hands or not." In my view, this finding indicates that the judge had concluded that the General Counsel had not sustained his burden of showing that Banks did not engage in any misconduct. I would have adopted this finding.

Company was aware of his union activities; and, his discharge was based on his union-related activities. Specifically his activities involved a strike at the Company's facility, which occurred from October 19 until October 30, 1992—at which time the parties arrived at a collective-bargaining agreement. I concluded the Company demonstrated it would have taken the same action it did with respect to Banks even in the absence of any protected conduct on his part. See: *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[1]

I concluded the Company discharged Banks based on its honestly held belief he engaged in serious picket line misconduct. *Clear Pine Mouldings,* 268 NLRB 1044 (1983).[2] The Government failed to prove Banks had not engaged in the misconducts or that the misconduct[3] was not sufficiently serious to forfeit the National Labor Relations Act's (Act's) protection. *Axelson, Inc.,* 285 NLRB 862, 864 (1987). I recommended the complaint be dismissed in its entirety.

I certify the accuracy of the portion of the transcript, as corrected,[4] pages 407–421, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

Exceptions may be filed in accordance with Section 102.46 of the Board's Rules and Regulations, but if they are not filed timely or properly filed, Section 102.48 provides that my bench decision shall automatically become the Board's Decision and Order.

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7) of the Act and has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The unfair labor practice complaint is dismissed.

APPENDIX A

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[Errors in the transcript have been noted and corrected.]

. . . .

JUDGE CATES: This is my decision. Let me first state that it has been a pleasure to be in Jackson, Mississippi. I have enjoyed the presentation of the case by the parties. It is always a pleasure to hear a case in which all parties know what it is they intend to establish and then do just that.

If you'll reflect back over this trial, I have asked few, if any, questions, and that is a credit to counsel from all sides. I commend you on the presentation of the case, all of you.

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So regardless of who wins or who loses, you may not lay it at the feet of counsel. Each have done an outstanding job presenting their points of view and the evidence therewith.

The charge in this proceeding was filed by the Union on May 17, 1993, and I find it was thereafter timely served on the Company.

I find the Company is a corporation, with an office and place of business located at Jackson, Mississippi, in which it manufactures large outdoor electrical equipment.

During the 12-month period ending April 30, 1995, which is a representative period, the Company, in conducting its business operations sold and shipped from its Jackson, Mississippi facility goods valued in excess of $50,000 to points located outside the State of Mississippi.

During that same period of time, the Company purchased and received at its facility in Jackson, Mississippi, goods valued in excess of $50,000 directly from points outside the State of Mississippi.

Based on that evidence and the admissions herein, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local Union No. 1956, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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I find that at all times material to this case, D.D. Countiss and Mike Goryl were supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The Government alleges at paragraph 7 of its complaint that the Company suspended on November 6 and 18, 1992, terminated the employment of its employee Jesse Banks. The Government alleges the Company discharged Mr. Banks because he assisted the Union, engaged in union activities, or to discourage employees from doing such.

More specifically, the Government contends Mr. Banks was not recalled, rehired, or re-employed because he engaged in and participated in a strike at the Company, and/or that he engaged in union or other concerted protected activities.

The Charging Party adds to that—and perhaps the General Counsel also—that Mr. Banks was not rehired or recalled because of his active role in the strike, and his status on the picket line as sort of a spokesperson for those engaging in a strike.

The Company's contention, on the other hand, is that Mr. Banks engaged in misconduct, and the testimony and evidence has alluded to a number of items the Company contends constitutes misconduct for which the Company says it relieves it of any obligation to recall or rehire or re-employ Mr. Banks.

First, let me describe some very general facts, and then I

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[1] The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[2] The Board explained the test to be applied in determining whether an employer may refuse to reinstate (or discharge) a striker based on alleged strike misconduct in *Mohawk Liqueur Co.,* 300 NLRB 1075 (1990). See also *Addington, Inc.,* 325 NLRB 702 (1998).

[3] The conduct Banks was discharged for is not disputed—in fact it was captured on videotape.

[4] I have corrected the transcript by making physical inserts, crossouts, and other obvious devices to conform to my intended words, without regard to what I may have actually said in the passages in question.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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will move into specific facts as I go through the case. As to these general facts, I don't perceive there is a conflict, but if you find that there's any evidence contrary to what I am finding as the general facts, then I have not credited any testimony that is contrary to these general facts.

I find the strike started on or about 12:01 a.m. on October 19, 1992, and continued until approximately October 30, 1992. If those dates are off slightly, it will not impact the outcome of this case.

I further find that at the beginning of the strike, on at least the morning hours of the first day, there were large numbers of pickets at the entrance, the front entrance, to the Company's facility, and that the large number of pickets, if they did not block, certainly impeded entrance to the facility on the first morning hours of the strike itself.

I base that, among other things, on the testimony of a number of the witnesses and on some videotaped activity. For example, Mr. Gray testified that the driveway was full of strikers, just jammed full of strikers.

Ms. Dixon and her husband, based on Ms. Dixon's testimony, found a large number of pickets were present on the first day, and that they did not proceed through on their attempt, but at the direction of the pickets, went to the back of the facility, and, again, on their first attempt at the back of the facility, were not able to, or elected not to, enter the

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premises, went someplace else, and later came back, and were able to enter the facility.

I am persuaded there were also tacks of a roofing-type nature on the roadway, of which the witness described the dimensions of, which I shall not take the time at this point to describe. Most of the people involved in this proceeding will understand what is meant by roofing tacks.

I find there were tacks on the picket line during the strike herein, particularly days one and two, and for the purposes of this decision, I perhaps need not decide beyond that whether there were racks thereafter or not.

I base my finding that there were tacks on the picket line based on the testimony of witnesses presented by both sides, that there were tacks on the picket line, the roadway leading in to the facility.

For example, Mr. Siler of, I believe at that time, Day Detectives, testified that he picked up a tack in one of the tires on his car on Monday, October 19.

Bernice Smith, I believe it was, testified that she was a picketer on the picket line and she saw tacks all over the road. Mr. Brandon, I believe it was, spoke of tacks on the drive leading in to the facility.

Now, I recognize that Ms. Miller testified she was on the picket line and never saw any tacks. I find that testimony unpersuasive with respect to the other evidence that there were

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tacks on the picket line, including the testimony of the sweeper operator, who was employed by a janitorial service doing business for the Company herein.

He testified that with magnetic-type equipment, he picked up nails, and that also with a sweeper-type machine, he picked up nails. So I am fully persuaded there was nails, and when I say nails, I'm referring to roofing-type nails, whether they call them nails or tacks.

That's the general setting of the strike in days one and two. And then the strike went on, as I indicated, that I believe ran to October 30, but it's not critical that I go that far.

Now, before I look at the specific facts and apply them to the law, let me just briefly make reference to the principles I will be guided by, based on the positions the parties have taken which I set forth earlier.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899, (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test for all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, the General Counsel must make a prima facie showing, sufficient to support the inference that protected conduct was a "motivating factor in the employer's decision." On such a showing, the burden shifts to the Employer, to demonstrate that

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same action would have taken place, even in the absence of the protected conduct.

The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1993).

Now, with respect to an employer's burden, I note that absent legitimate business reasons, an employer must reinstate striking employees at the termination of certain strikes. And for that proposition, see *General Chemical Corp*., 290 NLRB 76 at 82 (1988). A refusal to reinstate may be justified by showing that an employee was guilty of serious picket line misconduct. *Clear Pine Mouldings*, 268 NLRB 1044 at 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986).

Initially the Employer has the burden of demonstrating the existence of an honest belief that a striking employee engaged in such misconduct. Once such a belief has been demonstrated, the burden shifts to the General Counsel to prove that the employee was not engaged in the alleged misconduct or that the misconduct was not sufficiently serious to forfeit the Act's protection. For that proposition, see *Axelson, Inc*., 285 NLRB 862 at 864 (1987).

In *Clear Pine Mouldings*, the Board addressed the question of what test should be applied in determining whether an employer may refuse to reinstate a striker, based on alleged strike

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misconduct. There, the Board stated that the test is "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."

The *Clear Pine Mouldings* standard is an objective one. It does not call for an inquiry into whether any particular employee was actually coerced or intimidated. Rather, the test is applied to determine whether the conduct at issue would reasonably tend to coerce or intimidate an individual faced with such conduct.

That is the guiding principles under which I will decide this case.

First, did the Government establish a prima facie showing that Mr. Banks' union or protected activity was a motivating

factor in the Company's action against him? I find the General Counsel established a prima facie case.

Mr. Banks was a longtime employee of the Company, who, I think, commenced working for the Company in 1973, I think it was, and worked up until his separation in late 1992. Mr. Banks had union activity in that he helped in initially organizing for the Union at the Company, although I think the Company at that time went by a different name in those days.

Mr. Banks is one of those named in the charter of Local Union 1956, and that charter, I believe, was issued on February 16, 1976. Mr. Banks had served for the Union on the bargaining

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committee for the contracts that were negotiated between the Company and the Union for the 1980 to 1983 contract, the 1983 to 1986 contract, the 1986 to 1989 contract, and the 1989 to 1992 contract.

I note that Mr. Banks was not on the bargaining committee at the time of the strike here. I think the evidence shows he went off the bargaining committee in perhaps June of 1992.

Mr. Banks served as a strike captain on the 1992 strike at the facility, had spoken at union meetings on behalf of the Union and had spoken to the media about the strike and union- related matters.

Did the Company know of his activities? Absolutely so. He had been the signatory to the collective-bargaining agreements over the years indicated; he had been involved in certain grievances at the Company, and the Company was fully aware of his support of and participation with the Union.

The challenged employer action arose out of union and/or protected activities. In other words, the activities that brought about his demise with the Company grew out of the strike activity at the facility, and the discharge was close in time to the union activities, namely the strike.

So I'm persuaded the Government demonstrated a prima facie case, sufficient to support the inference that protected conduct was a motivating factor in its decision involving Mr.

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Banks.

The burden of persuasion at that point shifts to the Company for its affirmative defense. Would it have taken the same action, even if the employee had not engaged in any protected or concerted activity?

The Company must, in establishing or attempting to establish its affirmative defense, demonstrate the existence of an honest belief that the striking employee engaged in misconduct.

In support of that, the Company demonstrated large numbers of pickets on the picket lines, that claims were filed with it regarding customers, suppliers and other employees having had tire damage to their vehicles. In fact, I think, the evidence demonstrates the Company paid out in excess of $1200 for tire repair damage to various vehicles for which there had been claims made, for damage to tires.

Tacks were retrieved at the site. The Company even had a sweeper go through to clear the picket area, and the Company presented videotapes, specifically of two instances that are of great concern to me in this case. I do not mean to belittle the other matters.

But there is evidence presented by the Company of Mr. Banks making underhanded motions toward a vehicle that is proceeding into the Company. The Company also presented evidence of Mr. Banks kicking, or kicking at, a vehicle as it is entering or

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attempting to enter the premises.

Based on those two factors alone, without having to review the other items, I find the Company has demonstrated it had a good-faith belief Mr. Banks engaged in serious picket line misconduct.

The burden at that point shifted back to the Government, to the General Counsel, and on that burden, the General Counsel must demonstrate that either the individual did not engage in the misconduct, or the misconduct was not serious enough to warrant discharge or to warrant the failure on the Company's part to recall or to re-employ Mr. Banks.

On first defense that the General Counsel would need to meet to prevail, she does not. The videotape of the two incidences demonstrates the incidences took place. The more critical question and the one that requires closer scrutiny is: Was the misconduct that Mr. Banks engaged in sufficiently serious misconduct that would warrant a forfeiture on his part of the right to be reinstated.

The evidence indicates that Mr. Banks made underhanded motions underneath an automobile, as an automobile is entering the premises. Much has been made about the fact the videotape does not demonstrate that Mr. Banks actually had tacks in his hand or that he actually threw tacks under the automobile.

In the context of this situation—and the situation I'm

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making reference to is the activity along the picket line. In the context of this situation, where individuals are incurring tire damage and tacks being found in their tires, I'm persuaded that a reasonable person would be intimidated and coerced by the actions of Mr. Banks' movements, whether or not he had tacks in his hand.

I find the evidence is clearly inconclusive as to whether he had tacks in his hands or not, but I find for the purposes of this decision that it's of no great moment, that when he made the motions underneath the vehicle, that he was doing something underneath the vehicle, and in the context of this case, I'm persuaded a reasonable person would be intimidated and coerced by such action.

I would equate it to, for example, an individual saying, I pointed an empty gun; therefore, I can't be guilty because I didn't have anything in the gun. It's not a good argument, and it's not a good argument here to say that there was no proof that he actually threw tacks.

Going through the motion, under the circumstances of this case, is sufficient to meet the requirement, in my opinion, of the test as set forth in *Mohawk Liqueur Co.*, 300 NLRB 1075 (1990) (the test to be applied to determine whether the conduct at issue would reasonably tend to coerce or intimidate an individual faced with such conduct).

I'm persuaded that an individual who knows there are

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tacks or that there has been reports of tacks—and tire damage, for Mr. Banks to then engage in the conduct he did, which was

demonstrated on the video of making the underhanded motions, he must know it would be reasonable to conclude that an individual would find that intimidating and coercing.

Then I move to the second issue, and that is whether or not Mr. Banks kicked or stomped an automobile as it entered the facility or attempted to enter the facility. I find the evidence is inconclusive as to whether he actually made contact with the vehicle or not.

But I find for the purposes of this decision that is of no great moment, because an individual proceeding in and seeing the actions Mr. Banks took in kicking at or stomping the automobile is sufficient to meet the test that a reasonable person under the circumstances existing may reasonably tend to be coerced or intimidated.

And with respect to the tossing of the hand, when you look at the fact that the Day Detective, Mr. Siler, I believe it was, got a nail in his tire, Mr. Lowe spoke to roofing nails in the tires of his Corvette, I believe it was, and there was testimony that Jim Mayer had tacks in his tires and Mr. Chissum, I believe it was, so I find that the conduct that he engaged in was of a serious nature.

Now, I also have to go further and address whether the Company

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treated Mr. Banks in a disparate manner, even though I find he engaged in serious misconduct. Did they treat him in a disparate manner?

I find no persuasive evidence presented here that he was treated in a disparate manner. I'm also persuaded there is no antiunion animus present in this case on which to conclude there was disparate treatment.

For example, the local union president, Mr. Cagle, I believe it was, was recalled. The other strike captain was recalled, and if there was, in fact, a third strike captain, there's no contention that person was not recalled.

So I'm persuaded that, based on the evidence as I have articulated and outlined, I must recommend and do dismiss the complaint in its entirety.

Upon receipt of the transcript of this proceeding, I will certify those pages that constitute my decision to the Board, and it is my understanding it is from that point forward that an appeals period takes effect or runs from that period forward.

Please do not be bound, however, by my understanding of the rules. Refer to them yourself, and exceptions or any further action that need be taken may be taken at that point. It is my understanding of the rules that nothing can be done between now and the time that I certify the bench decision.

The court reporter normally provides me transcript within 10 days of the conclusion of the hearing or at least reasonably

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soon thereafter, and as reasonably soon as I am in the office, I will certify those pages of the transcript that constitute my decision to the Board.

With that, this trial is closed.

Andrea J. Goetze, Esq., for the General Counsel.
Armin J. Moeller Jr., Esq. and *Phelps Dunbar, Esq.,* for the Respondent.
Danny E. Cupit, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge. My initial bench decision in the above-captioned matter issued on July 6, 1998. On December 21, 1998, the National Labor Relations Board (Board) issued its unpublished Decision and Order Remanding,[1] in which the case was remanded to me.

The Decision and Order Remanding, reads in part:

> The Board . . . finds that substantial and material issues of fact remain unresolved.
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> Accordingly, the Board has decided to remand this proceeding to the Judge for him to make findings of fact, on the basis of the preponderance of the evidence in the existing record, whether alleged discriminatee Jesse Banks in fact kicked cars or threw roofing tacks (also referred to as roofing nails) onto the roadway entrance at the Respondent's plant during the strike in this case.
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> [T]he judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand.

The parties stipulated a strike commenced at the Company's facility on or about Monday, October 19, 1992, and ended on or about October 30, 1992. The focus of the remand centers on a timeframe commencing October 19 and continuing through October 21, 1992. A restatement of certain operative facts is instructive.

Local Union President Billy Cagle testified that on the first day of the strike and thereafter those employees picketing "expressed their dissatisfaction" with those employees who chose to cross the picket line. Local Union President Cagle testified; "they hollowed, scabs, and they made it very well known that they didn't appreciate them crossing the picket line." Local Union President Cagle placed Jesse Banks (Banks) on the picket line on the dates in question as a strike captain,[2] but stated he never observed Banks engaging in any misconduct. On cross-examination, Local Union President Cagle acknowledged he was informed by the Richland, Mississippi chief of police early in the strike "there are a few tacks out there; I don't believe that the Union threw them. If they did, you need to tell them we don't want to see any tacks."[3] Local Union President Cagle borrowed the Richland, Mississippi chief of police's loud speaker and: "I said . . . the chief of police said there are a few tacks out here. The Union don't condone that."

Local Union President Cagle testified, "I believe there were some tacks there, because he [chief of police] said there were." Cagle added, "I didn't actually see any, but we told them to arrest anybody caught doing anything at the time."

Local Union President Cagle identified Banks in a video taken at the picket line during the early stages of the strike making a "bowling motion" under a car. Cagle acknowledged

[1] Member Brame dissented stating in part "The majority's [Members Fox and Liebman] remand of this case is unwarranted."

[2] Cagle identified Billy Dykes as the other strike captain.

[3] Richland, Mississippi Police Lieutenant David Lucas testified he did not observe Banks throw tacks at or kick vehicles when he (Lucas) was at the strike site. Lucas, however, acknowledged on cross-examination that "the patrol car had a flat" but added he could not say "if it was particularly a tack." When pressed he testified "we could have had flats." Lucas acknowledged that in his testimony at an arbitration hearing he could have testified about "a patrol car having a tack in a tire."

Banks was "very low to the ground" and further acknowledged "that's his arm, sticking all the way under the tire."

Don Siler testified that in 1992 he worked for a private investigating company, Day Detectives, and during the strike was "assigned to film the strike line during the shift changes at the plant." Siler testified he did not know, nor was he instructed, to film Banks. Detective Siler testified the first time he saw tacks at the picket line was on Monday, October 19, 1992, when he picked one up in his tire as he was leaving the picket line at the plant. Detective Siler testified "I believe I witnessed some tack-throwing on the picket line." Siler added, "I witnessed an individual on the strike line, at the time certain few cars came through. He would kneel down on his knees and make a tossing motion under the car."[4] Detective Siler testified he did not at that time know the individual but later learned it was Jesse Banks. Detective Siler testified Banks, among other strikers, told him he needed to find something else to do that they "were tired of seeing me come through here" and Siler "needed to get out of here."

Ricky Bowden, a then (1992) employee of Douglas Janitorial Service worked for that company at the site of the Company here performing janitorial services. During the strike Bowden testified he operated a forklift with a magnet to pick up "sheetrock nails" from the roadway at the Company. Bowden testified he also operated a road sweeper at the front and rear entrances at the Company to sweep up nails and roofing tacks. Bowden testified that when he was doing a sweep for nails at the front entrance at the Company he encountered Jesse Banks. Bowden testified he had known Banks all his life. Bowden explained "[e]ver since I remember being in the world, I remember Jesse Banks. He [Banks] was an image that we looked up to, the kids looked up to." Bowden testified that while he was performing his nail sweeping duties Banks "advised harshly that I remove myself from out there around the picket line." Bowden testified company management "advised that I go ahead and pull off from the area at that time" following his confrontation with Banks. Bowden testified he picked up tacks each time he swept the picket line area.

Employee James Lowe testified that while going to work during the strike, he encountered "a problem" getting into the parking lot "everybody would stop your car," "demand that you roll the window down," "but they eventually let you go by." Lowe testified, "I went out to go to lunch, and exiting the parking lot, I received 12 or 13 roofing tacks . . . put in my tires on my car." Lowe reported the tire damage to company management and was instructed to have his tires repaired at company expense. Lowe testified that as he left the Company that evening, he "kind of gave them [the pickets] a piece of what for," adding, "I was hacked off that they got me tied up in the middle there," explaining, "I've known some of them practically since I was a child." Lowe stated those present, including Jesse Banks, "just laughed it off . . . but I didn't think it was funny at all at the time."

Employee Clay Coleman testified he and fellow employee Bennie Chissum were intending to go for lunch away from the Company on an occasion during the strike but that he (Coleman) decided to remain at the Company. Coleman testified Chissum left and as he was returning down the driveway into the plant he heard "tap, tap, tap, tap," from Chissum's car tires "and he had tacks in his tires." Coleman testified that when fellow employee Jim Mayer returned from lunch, "his tires sounded like he was tap-dancing, coming down the road. He had tacks in all tires."

Employee Bernice Smith testified she visited the picket line before she was scheduled to perform picket line duty and "everybody" was present, including Jesse Banks. Smith testified that one morning while she was at the picket line, she observed tacks on the road. Smith testified "they was all over the road, the turn-in, you know. They was all over where you turn in and go down there." Smith said Jesse Banks was present on that occasion.

Employee and union member David Johnson testified he participated in the strike by being "out on the picket line" and was present the first day of the strike. David Johnson testified "when I came there that morning, there was tacks all in the road, and a friend of mine said, man, there's tacks everywhere." David Johnson estimated there was "a bunch" of tacks. When asked if there were more than 10 tacks, David Johnson responded; "there was ten in one tire, I imagine." David Johnson testified police officers were present and one of them "smiled" and "kicked the tacks around." David Johnson testified he overheard Jesse Banks on the picket line tell Dee McHaffy "don't get any tacks out of his car."

Purchasing Department employee Osborn Johnson testified his department rented a van during the strike and he was assigned the task of making "pick-ups and deliveries" with the van. Osborn Johnson testified the van picked up "multiple tacks in multiple tires" going through the picket line. Osborn Johnson testified Jesse Banks "was visible most of the time when I was going in and out" with the van. Osborn Johnson testified, "on one occasion when I was coming out of the gate . . . he [Jesse Banks] made a . . . tossing gesture . . . I didn't see any tacks, but he made a gesture. We made eye contact in the mirror. He was smiling." Osborn Johnson testified no one else made any such gestures at him.

Vice President of Human Resources Michael Goryl testified the Company made a decision before the strike, to operate, in the event of a strike. Goryl testified that on the first day of the strike mass picketing blocked, for a while, the entrances and exits at the Company. Goryl testified it was brought to his attention the pickets were shouting and beating on cars. Goryl testified: "And then as the strike progressed, the tack-throwing became very apparent early Tuesday morning continuing through Wednesday." Goryl said: "It was reported to me that employees were picking up tacks in their tires." Goryl explained, "I was receiving a number of complaints from employees and vendors, that they were picking up significant amounts of tacks in their tires, as they were either trying to enter or exit the facility." Goryl testified that as a result of these complaints and reports, he ordered that a sweeper clear the entrances and exits to the Company. Goryl also telephoned the Richland, Mississippi chief of police to ask for the city's assistance in keeping the traffic lanes clear. The Company obtained a temporary restraining order and a preliminary injunction from a local court regarding keeping the plant entrances open. Goryl testified the Company had never, before the strike nor since the strike, experienced tacks-in-the-roadway problems. The Company incurred over $1200 of tire repair expenses for employees, customers, pickup and delivery personnel, and others.

Goryl personally picked up tacks at the picket line during the course of the strike. Goryl described the tacks as roofing types

[4] Detective Siler testified: "Based on what I saw, I could think of no other reason he'd be doing that, other than tossing tacks."

about "three-quarters of an inch" in length with "a square—about three-quarter-inch square flat, metal surface to hold . . . roofing felt down." Goryl said other tacks were the same length with "a large round head," a "galvanized roofing tack . . . but with a small head," and "a large nail . . . with about a quarter-inch round head."

It is against the above-credited detailed description of activities on or about the picket line during the early days of the strike that I evaluate Jesse Banks' testimony related to tack throwing and car kicking.

After observing Banks and the other 15 witnesses who testified, I was unwilling at trial, and remain unwilling, to credit any uncorroborated testimony by Banks. Simply stated, and as hereinafter explained, I did not find Banks to be a reliable witness. For example, I am persuaded Banks, as one of two strike captains on the picket line, "[f]rom day one until it ended" participated in, heard, saw, and/or was aware of far more than he was willing or able to truthfully recall. When asked, for example, what he did on the picket line Banks responded "just picket." Banks said daily devotionals were conducted, prayers were recited, and the pickets talked to people crossing the picket line. Banks, however, denied seeing any tacks on the roadway at the Company or seeing any tacks in pickets' hands or in their possession. In that regard, the only thing Banks acknowledged seeing was some "aluminum foil" twisted to look like tacks.

Banks gave his testimony in the face of compelling evidence to the contrary as reviewed below.

Local Union President Billy Cagle testified the chief of police for Richland, Mississippi, told him on the picket line there were tacks on the roadway and that he thereafter announced on a loudspeaker to the pickets the chief's concern about tacks.[5] It is unbelievable Banks would not have heard or had this announcement by his local union president brought to his attention.

Douglas Janitorial Service employee Ricky Bowden credibly testified he operated a magnet equipped forklift on the picket line to pick up "sheetrock nails" from the roadway at the picket line. Bowden also testified he operated a sweeper to clear tacks from the roadway at the picket line. Bowden testified he and Banks had a confrontation at the picket line. According to Bowden's credited testimony, Banks told him "harshly" to remove himself from the picket line. Regardless of what brought about the confrontation between Bowden and Banks, it is unbelievable Banks would not have been aware of, or observed, tacks on the picket line.

Employee David Johnson testified he participated in the strike as a picket. David Johnson credibly testified he saw "a bunch" of tacks all in the road at the picket line. David Johnson stated he even saw a police officer smilingly kicking tacks around at the picket line. David Johnson credibly testified he heard Jesse Banks say to Dee McHaffy on the picket line "don't get any tacks out of his car." Again it is unbelievable Banks did not know of, hear about, or see, tacks on the picket line.

Employee Bernice Smith, who served on the picket line, testified she saw tacks on the roadway. She said "they was all over the road, the turn in." Employee Osborn Johnson testified he was assigned to drive a company rented van for pickup and delivery purposes during the strike and while driving along the picket line, entering and leaving the plant, he picked up "multiple tacks in multiple tires." Day Detective Company employee Don Siler testified he became aware of tacks on the roadway on Monday, October 19, 1992. Detective Siler picked up a tack in one of the tires on his vehicle as he left the plant on that date. Employee Clay Coleman convincingly testified about seeing and hearing tacks in employee Bennie Chissum's car tires as well as in employee Jim Mayer's car tires. Vice President Michael Goryl credibly testified tack throwing was readily apparent during the strike. As a result of reports by employees and others of tacks in their tires, he, Goryl, ordered the roadway area swept by a power sweeper. The Company paid in excess of $1200 in tire repair costs for those having tire damage as a result of entering and leaving the Company during the strike. Employee James Lowe credibly testified about getting 12 or 13 roofing tacks in his tires as he left the Company. Lowe stated he was "hacked off" at the pickets, some of whom he had known from childhood, and gave them "a piece of what-for." Lowe testified those present, including Jesse Banks, "just laughed it off." In light of the above, it is unbelievable Banks knew nothing of, and/or ever saw, or heard about any tacks along the picket line.

Banks' trial testimony regarding a lack of knowledge of tacks on the picket line was then, and still is, troubling as related to his overall credibility. Banks' credibility was not enhanced by the fact he was not arrested for any tacks related incidents on the picket line. Such failure is unpersuasive viewed in light of the testimony that a policeman was smilingly kicking tacks around on the picket line. I also found unpersuasive the testimony of two witnesses that they did not see "a tack" in Banks' hand during the time they were on the picket line.

Did Banks throw roofing tacks (also referred to as roofing nails) onto the roadway at a vehicle entrance to the Company's plant during the strike in this case? Banks denied doing so. In fact, Banks testified he never placed tacks on company property, never saw any tacks in any pickets possession, didn't see any tacks within 300 feet of the picket line at any time, never saw any tacks on the roadways at the Company, and had no idea what the power sweeper was doing along the picket line during the strike. Banks did, however, acknowledge he appeared on videotape "making two separate underhanded tossing motions below tires of vehicles." Although it is clearly inconclusive on the video in question whether Banks actually had tacks in his hand at the times in question, I am, in light of his lack of credibility on other matters and the overwhelming weight of the evidence, compelled to conclude, as I do, that Banks had and threw tacks under the vehicles. I am persuaded, even beyond a reasonable doubt. The picket line was tack strewn. Day Detective Company Detective Siler credibly testified he saw an individual on this tack strewn picket line kneel down on his knees "at the time certain few cars came through" "and make a tossing motion under the cars." Detective Siler did not know at the time, but later learned, the individual in question was Banks. Detective Siler testified, "based on what I saw, I could think of no other reason he'd be doing that, other than tossing tacks." Considering all the tacks that were on the picket line and the resulting tire damages, Detective Siler's conclusion is very instructive. Furthermore, employee Osborn Johnson credibly testified "on one occasion when I was coming out of the gate . . . [Jesse Banks] . . . made a tossing gesture."

[5] Richland, Mississippi Police Lieutenant David Lucas, albeit somewhat reluctantly, acknowledged there were tacks on the roadway at the plant during the strike and even that a patrol car had a flat tire.

Although Osborn Johnson added, "I didn't see any tacks" he was certain Banks made such a gesture because they made eye contact in the mirror and Banks was smiling. Osborn Johnson testified no one else made any such gestures at him or toward his vehicle. In light of the facts herein, the only plausible conclusion is that Banks tossed tacks onto the roadway when certain vehicles entered and/or left the Company, and I so find.

Did Banks kick cars at a vehicular entrance to the Company's plant during the strike here? Banks denied doing so, but acknowledged he appeared on videotape making "a kicking motion" toward employee James Gray's car as it passed through the picket line. It is clearly inconclusive on the video in question whether Banks actually made contact with the car as he kicked at it. However, based upon Banks established conduct on the picket line, taken in conjunction with his other unbelievable denials and discredited testimony, and viewed in light of no logical explanation for his actions, it is very probable, and I find, Banks did in fact kick employee Gray's car on the picket line.

Lest it not be crystal clear, I expressly, unambiguously, and unequivocally discredit Banks' testimony that he did not throw tacks on the roadway or kick cars on the picket line during the strike.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

I reaffirm my prior findings, conclusions, and recommended Order.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.